Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-29

AIRCRAFT & HELICOPTER LEASING & SALES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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No. .....

AIRCRAFT & HELICOPTER LEASING & SALES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

STATEMENT AS TO JURISDICTION.

The Petitioner, Aircraft & Helicopter Leasing & Sales, Inc., prays that a Writ of Certiorari issue to review the Order of the Court of Appeals for the Ninth Circuit rendered in these proceedings on March 17, 1975.

Opinion Below.

The Order of the said Court of Appeals (Appendix A, *infra,* pp. 1-4), *N.L.R.B. v. Aircraft & Helicopter Leasing & Sales, Inc.,* is unpublished.

Jurisdiction.

Said Court of Appeals denied a timely filed Petition for Rehearing on April 9, 1975, and a Notice of Appeal from its Ruling, and from said denial of said Petition for Rehearing, was filed on June 20, 1975. The jurisdiction of this Court is invoked pursuant to Section 1254(1), Title 28, United States Code.

Questions Presented.

The National Labor Relations Board, Respondent, brought action against Petitioner under powers granted to it pursuant to Section 160, *et seq.*, Title 29, of said Code, charging that Petitioner was guilty of unfair labor practices.

The questions arising thereby are:

1. Did Respondent have jurisdiction in the Action it initiated?

A. Was Petitioner, insofar as the involved employees were concerned, engaged in interstate commerce?

B. Were the involved employees, when contacting Petitioner through its Agent, engaged in a concerted action so as to come within the purview of Section 157, Title 29, of said Code?

Statement of Facts.

The Petitioner, Aircraft & Helicopter Leasing & Sales, Inc., is a California corporation with offices in Sun Valley, California. It is engaged in the manufacture, repair, sale and leasing of helicopters. In February, 1973, it employed, among other persons, Stephen Crowe, Dan Crowse, Claude Fournier, George Zuniga and Royal Wiley. The employees were not members of any union. On February 5, 1973, these five employees met in private to discuss their wages. They all felt that they should be earning a higher salary and that they would like to be furnished uniforms to wear and would like to have certain other benefits. The major consideration, however, was wages. Some of them had approached the management in the past as individuals and asked for a raise and were unsuccessful.

Crowe suggested that they make a group demand and that perhaps they would be more successful.

It was decided that they would approach their supervisor, Jesse James, and present their demand. Crowe testified that there was no discussion about what would be done if the demands were not met. [R. Tr. 73.]* Others, however, testified that there was some discussion that if anyone was fired that they would all "walk out" in order to back him up. At any rate, however, they discussed a walkout only among themselves. Each testified that they did not threaten walkout to their employer. [R. Tr. 27, 28, 32, 33, 73, 82, 121.]

These five employees then met with James and stated their demands. Crowe acted as spokesman, and told James they they were unhappy with the wages, that they would like uniforms and a cost of living raise. Crowe stated that he would like Eight Hundred Fifty Dollars ($850.00) per month, Crowse asked for Four Dollars ($4.00) per hour, and Fournier requested Nine Hundred Dollars ($900.00) per month. The other two employees did not make a request. [R. Tr. 11, 67.] There was no discussion as to what would be done if these demands were not met, except a statement by Fournier that, "Jesse, I don't believe you quite understand, this is an alternative." [R. Tr. 11, 27, 28, 32, 90.] There was no discussion as to what the alternative was.

James then discussed the demands with George Lam, the President of the Petitioner corporation. He told Lam that he expected three of the employees would

*R. Tr. refers to the stenographic transcript of the testimony at the Unfair Labor Practice Hearing.

walk out on Friday if the demands were not met. [R. Tr. 178.] He further testified that to him the term "walk out" meant quit. [R. Tr. 176.] Likewise, Lam testified that he thought the employees intended to quit. [R. Tr. 222, 228, 229.] The administrative law judge made a specific finding that James and Lam believed that the employees intended to sever employment.

They determined none of the men were deserving of a raise in pay other than Crowe, and Lam authorized an immediate raise for him. [R. Tr. 215.] Since they felt that three of the men would quit, for convenience James directed the accountant to prepare paychecks for them. Since they did not expect Zuniga and Wiley to quit, they did not have their checks prepared.

A few days later, the men asked James if any decision had been made about their demands. [R. Tr. 15, 16, 105, 106, 181, 182.] James replied that a decision had been made and that either he or Lam would meet singly with the employees in the office but they would not meet with them collectively. [R. Tr. 16, 42, 182.] Crowe informed the other employees and it was decided that they would abandon their demand to meet in a group and meet singly with James. [R. Tr. 42, 46-49, 76, 142, 143.] Two of the employees, Crowse and Wiley, indicated that they no longer intended to support the group anyway. [R. Tr. 76, 106, 107, 149.]

The first employee to meet with James was Crowse who informed James that, "I have had a change of

mind * * *. If I have not jeopardized my job * * * I would like to stay on with you." [R. Tr. 164, 165, 183, 194.] James replied that the company was not satisfied with Crowse's past work performance and could not keep him on the payroll. [R. Tr. 116, 117, 164, 165, 183, 188, 194, 195.] The company had placed a newspaper advertisement the previous month seeking a replacement for Crowse and used this opportunity to terminate employment. Crowse stated that he would not continue to work for the company at his regular salary in any event. [R. Tr. 117.]

After leaving the office, Crowse walked past the other employees, showed his check and indicated that the company had paid him off. [R. Tr. 17, 43, 50, 77, 109, 121.] None of the employees walked out with Crowse. Instead Fournier entered James' office for a meeting.

Fournier asked what was happening and if the employees were going to receive raises. [R. Tr. 17, 186, 195.] James said they were not, and Fournier said, "That's it. I am through. I'll get my tool box and leave." [R. Tr. 186, 195.]

When Fournier left the office, the others were aware that he was leaving the employ of the Petitioner. However, none of the employees walked out with him. Instead, Crowe met with James.

James offered him the raise previously authorized by Lam. [R. Tr. 51, 52, 78, 91, 93, 145, 146, 162, 185, 189.] Crowe left the office briefly to speak with the

other employees. [R. Tr. 91, 93.] When he returned, he informed James that he could not accept the raise because he had been the instigator of the employees' actions and felt obligated to stick with the other men, that he was "leaving", "terminating". [R. Tr. 94.]

Wiley and Zuniga also met with James on that date. Wiley told James that he wanted to stay on the job and has continued to work for the company since. James asked Zuniga if he was, "staying with me or are you going to walk out?" [R. Tr. 187.] Zuniga indicated that he had given his word of honor to the men and felt obligated to leave with them. [R. Tr. 123, 126, 187, 196.] James said he was sorry to hear this and that he didn't expect Zuniga to leave. He gave Zuniga until the following Monday morning to think over returning to work. [R. Tr. 124, 127, 187, 196.]

On the next day, Saturday, February 10, 1973, Crowse and Fournier made separate phone calls to Lam to wish him well on a trip he was about to take. In the course of the conversation, Lam indicated that he would be willing to talk to each about returning to work. [R. Tr. 219-223.]

At the time of the meeting with James, Crowe, Crowse and Fournier were given their final paychecks when they left James' office. Since it had not been anticipated that Zuniga or Wiley would leave, no checks had been prepared for them.

REASONS FOR GRANTING THE WRIT.

A cogent reason for this Court's consideration of its review on certiorari, underlying and permeating the following subsidiary reasons, is that said Court of Appeals has so far sanctioned the action of Respondent in its departure from the accepted and usual course of pertinent judicial proceedings as to call for an exercise of the Court's power of supervision as will hereinafter be disclosed.

In initiating its proceeding against Petitioner, Respondent was aware that—

> THE NATIONAL LABOR RELATIONS ACT CONTEMPLATES NO MORE THAN THE PROTECTION OF THE PUBLIC RIGHTS WHICH IT CREATES AND DEFINES.
>
> *Nat'l Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 366.

Furthermore, that—

> A PROCEEDING UNDER THIS ACT IS NOT, AND CANNOT BE MADE, A PROCEEDING TO ENFORCE A PRIVATE RIGHT; IT IS A PUBLIC PROCEDURE, LOOKING ONLY TO PUBLIC ENDS.
>
> *N.L.R.B. v. Colten*, 105 F.2d 179.

and that—

> THE NATIONAL LABOR RELATIONS BOARD ACTS IN A PUBLIC CAPACITY TO GIVE EFFECT TO THE DECLARED PUBLIC POLICY OF THE ACT (Sec. 151 *et seq.*)
>
> *N.L.R.B. v. Killoren*, 122 F.2d 609.
>
> THE JURISDICTION OF THE BOARD IS NOT TO BE EXERCISED IN ANY PARTICULAR CASE UNLESS IN THE OPINION OF THE BOARD THE UNFAIR LABOR PRAC-

TICE COMPLAINED OF INTERFERES SO SUBSTANTIALLY WITH THE PUBLIC RIGHTS CREATED BY THIS ACT (Sec. 151 *et seq.*) AS TO REQUIRE ITS RESTRAINTS IN THE PUBLIC INTEREST.

N.L.R.B. v. Newark Morning Ledger Co., 120 F.2d 262.

At no place in the Record is it shown that the labor dispute between Petitioner and its employees interfered with the public rights created by said Sections 151 *et seq.* so as to require its restraints in the public interest.

That being the case, Petitioner holds it to have been of doubtful operability that—

THE BOARD IS REQUIRED TO OBSERVE THE TRADITIONAL RULE AGAINST THE PRESUMPTION OF LIABILITY OR BAD FAITH.

Boeing Airplane Co. v. N.L.R.B., 140 F.2d 423.

because,

THE TEST OF THE BOARD'S JURISDICTION UNDER THIS ACT (Sec. 151 *et seq.*) IS NOT WHETHER THE OPERATIONS OF THE EMPLOYER CONSTITUTE INTERSTATE COMMERCE BUT WHETHER THE STOPPAGE OF ITS OPERATIONS BY THREATENED INDUSTRIAL STRIFE WOULD RESULT IN SUBSTANTIAL INTERRUPTION TO OR INTERFERENCE WITH THE FREE FLOW OF SUCH COMMERCE.

N.L.R.B. v. Baltimore Transit Co., 140 F.2d 51.

and—

BEFORE THE BOARD MAY EXERCISE JURISDICTION IT MUST APPEAR EITHER THAT THE INDUSTRY UNDER CONSIDERATION IS ENGAGED IN INTERSTATE COMMERCE OR THAT ITS INTRASTATE BUSINESS IS OF SUCH A NATURE THAT DISTURBANCE THEREOF WOULD SUBSTANTIALLY AFFECT INTERSTATE COMMERCE.

Pueblo Gas & Fuel Co. v. N.L.R.B., 118 F.2d 304.

it being apparent that—

CONGRESS DID NOT INTEND TO CONFER POWER ON THE BOARD TO REGULATE UNFAIR LABOR PRACTICES AFFECTING INTRASTATE COMMERCE.

Foster Bros. Mfg. Co., Inc. v. N.L.R.B., 85 F.2d 984.

There has been no evidence produced in this Action that Petitioner engaged in interstate commerce, either directly or indirectly, or that "its intrastate business is of such a nature that disturbance thereof would substantially affect interstate commerce" (*Pueblo Gas*), or that "the stoppage of its operations by threatened industrial strife would result in substantial interruption to or interference with the free flow of such commerce". (Baltimore Transit.)

The Administrative Law Judge, in his Findings of Fact with regard to Petitioner's business, found that—

"During the year preceding issuance of the complaint, Respondent realized revenues exceeding $50,000.00 from the shipment of goods from its Sun Valley location directly to customers outside of California."

"Respondent is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act." (RA, V-I, p. 13.)*

The foregoing is seriously questioned inasmuch as there appears to be no evidence in support thereof. The reference, thereto, in the Complaint, although undenied in the Answer, nevertheless does not comprise evidence to support a Finding of Fact; and, particularly is this so in view of the fact that George E. Lam, Petitioner's President, was called to the stand as Petitioners' witness, and was available to Respondent's Counsel for Cross-Examination, and was directly questioned by said Judge, but at no time did either of them question Mr. Lam as to the actual nature of Petitioner's business, whether any part thereof actually flowed out of the State of California, and, if any of it did, how much of it, worked upon by the three employees, was directly involved in interstate commerce.

The National Labor Relations Board, on February 28, 1974, adopted, as its Decision and Order, "the rulings, findings, and conclusions of the Administrative Law Judge" (RA, V-I, p. 38.)

FINDINGS OF THE BOARD ARE CONCLUSIVE IF SUPPORTED BY THE EVIDENCE.

N.L.R.B. v. Register Pub. Co., (9) 141 F.2d 156.

But,

THE FINDINGS OF THE BOARD MUST HAVE SUBSTANTIAL SUPPORT IN THE EVIDENCE.

N.L.R.B. v. Norfolk Shipbuilding Corp., 109 F.2d 128.

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*RA refers to the Clerk's Record on Appeal.

about which,

THE PRINCIPLES WHICH APPLY TO TESTING WHETHER THE EVIDENCE WILL SUPPORT A JURY VERDICT APPLY TO THE FINDINGS OF THE BOARD.

N.L.R.B. v. Alco Feed Mills, 133 F.2d 419.

In other words,

IN ITS CAPACITY AS TRIER, THE BOARD IS HELD TO THE SAME STANDARD OF IMPARTIALITY AND FAIRNESS THAT A JURY IS HELD TO, AND ITS FINDINGS MUST REST ON SUBSTANTIAL EVIDENCE.

Magnolia Petroleum Co. v. N.L.R.B., 112 F.2d 545.

It is manifest that neither the Judge nor the Board, in the capacity of trier, were held to the same standard of impartiality and fairness that a jury is held to or one of them would have determined that Petitioner was not engaged in interstate commerce because—

THIS REVIEW OF THE CASES MAKES IT CLEAR THAT THE MERE REDUCTION IN THE SUPPLY OF AN ARTICLE TO BE SHIPPED IN INTERSTATE COMMERCE, BY THE ILLEGAL OR TORTIOUS PREVENTION OF ITS MANUFACTURE, IS ORDINARILY AN INDIRECT AND REMOTE OBSTRUCTION TO THAT COMMERCE. IT IS ONLY WHEN THE INTENT OR NECESSARY EFFECT ON SUCH COMMERCE IN THE ARTICLE IS TO ENABLE THOSE PREVENTING THE MANUFACTURER TO MONOPOLIZE THE SUPPLY, CONTROL ITS PRICE OR DISCRIMINATE BETWEEN ITS WOULD-BE PUR-

CHASERS, THAT THE UNLAWUL INTERFERENCE WITH ITS MANUFACTURE CAN BE SAID DIRECTLY TO BURDEN INTERSTATE COMMERCE.

Industrial Assn. of S.F. v. United States, 268 U.S. 64.

Patently, relating to Petitioner's situation, the stoppage of repair and maintenance of its helicopters because the three mechanics stopped working for it merely reduced the supply thereof for lease or sale that could be used outside the State of California. There was no showing whatsoever that the equipment those mechanics worked on were destined to be shipped or used in interstate commerce, and that their not working on the equipment in any way interfered with interstate commerce, even if it were shown that the employer himself was engaged in interstate commerce.

A consideration of the foregoing shows, without question, that Petitioner, insofar as the involved employees were concerned, was not engaged in interstate commerce and, therefore, Respondent did not have jurisdiction in the Action it initiated.

* * *

It is patent, without question, that Petitioner would have had to be engaged in interstate commerce of such nature and to such extent that work stoppage, such as would be caused by the three of Petitioner's employees, the consequences thereof would not have fallen within the purview of the *Industrial Assn.* ruling just quoted, in order for their work stoppage to have brought their

action within Section 157, Title 29, of said Code, providing, in part, for the protection of concerted activities for employees mutual aid or protection, because,

IN DETERMINING THE CONSTITUTIONAL BOUNDS OF AUTHORITY CONFERRED ON THE BOARD BY THIS SUBCHAPTER (Sec. 151 et seq.), IT IS THE EFFECT UPON INTERSTATE OR FOREIGN COMMERCE AND NOT THE SOURCE OF THE INJURY WHICH IS THE CRITERION.

Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197.

That ruling, as applied to Petitioner's situation, is—

. . . THE ALL-IMPORTANT FACT THAT THERE WAS NO INTERFERENCE WITH THE FREEDOM OF OUTSIDE MANUFACTURERS TO SELL AND SHIP OR OF THE LOCAL CONTRACTOR TO BUY. THE PROCESS WENT NO FURTHER THAN TO TAKE AWAY THE LATTER'S OPPORTUNITY TO USE, AND, THEREFORE, HIS INCENTIVE TO PURCHASE. THE EFFECT UPON, AND INTERFERENCE WITH, INTERSTATE TRADE, IF ANY, WERE CLEARLY INCIDENTAL, INDIRECT AND REMOTE—PRECISELY SUCH AN INTERFERENCE AS THIS COURT DEALT WITH IN *United Mine Workers v. Coronado Co.,* 259 U.S. 344, and *United Leather Workers v. Herkert,* 265 U.S. 457.

Industrial Assn. of S.F. v. United States, 268 U.S. 64.

So, in Petitioner's situation, the stoppage of work by the three employees was *not* the criterion for determining the Board's authority (Consolidated), and said stoppage of work had, if any, such an incidental, indirect, and remote, interference with any interstate commerce in which Petitioner might have been engaged (Industrial Assn.) that it would not confer any jurisdiction upon said Board.

Inasmuch as—

> THE BOARD ASSERTS A PUBLIC RIGHT VESTED IN IT AS A PUBLIC BODY, CHARGED IN THE PUBLIC INTEREST WITH THE DUTY OF PREVENTING UNFAIR LABOR PRACTICES.
>
> *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332.
>
> (IT) DOES NOT EXIST FOR THE ADJUDICATION OF PRIVATE RIGHTS.
>
> *N.L.R.B. v. Hudson Motor Car Co.*, 136 F.2d 385.

Therefore,

> THIS CHAPTER CREATES NO PRIVATE VESTED RIGHTS BUT ONLY PUBLIC RIGHTS WHICH ARE AT ALL TIMES SUBJECT TO THE CONTROL OF CONGRESS.
>
> *Superior Engraving Co. v. N.L.R.B.*, 183 F.2d 783.

it being that—

> THIS SUBCHAPTER (Sec. 151 et seq.) DOES NOT CONFER PRIVATE RIGHTS ENFORCEABLE BY JURY TRIAL.
>
> *Agwilines, Inc. v. N.L.R.B.*, 87 F.2d 146.

In other words,

> THIS SUBCHAPTER (Sec. 151 *et seq.*) DOES NOT INTERFERE WITH THE NORMAL RIGHT OF THE EMPLOYER TO SELECT ITS EMPLOYEES OR TO DISCHARGE THEM.
>
> *N.L.R.B. v. Boss Mfg. Co.*, 107 F.2d 574.

nor does—

> THIS ACT GIVES THE BOARD SUPERVISORY POWER OVER THE CONDUCT OF A BUSINESS BY ITS OWN MANAGEMENT.
>
> *Kansas City Power & Light Co. v. N.L.R.B.*, 111 F.2d 340.

In regard to Petitioner and its conduct with its employees, the Judge and the Board would like to make it appear that said employees were engaged in a "protected" concerted activity for the purpose of collective bargaining (Sec. 157), but such is not a tenable position in that it is unsupported by the evidence.

The only concerted activity engaged in by the employees was a meeting in the office of a Jesse James, Supervisor with authority to hire and fire employees, on February 5, 1973, with five employees—Crowe, Fournier, Crowse, Wiley, and Zuniga—during which Crowe, acting as spokesman, told James that they were unhappy with the wages, would like to have uniforms, and a cost-of-living raise. [R. Tr. p. 67, lines 15-18.] That was the only "concerted" activity in evidence. Immediately thereafter, Fournier said he wanted a hundred dollars; Crowe thought he was worth $850.00 a month, but did not know what the rest of the fellows wanted; Crowse thought he wanted $4.00; Wiley and Zuniga were silent. [R. Tr. p. 67, lines 20-25.] Four-

nier's version of the same meeting was substantially the same; that Crowe told James that he thought the wages were too small, that he thought they should be getting a cost-of-living wage increase. Again, this is all the Judge hung-his-hat on as being "concerted" activity. Immediately thereafter, each veered off in his individual direction, as the Record shows. [R. Tr. p. 10, lines 9-24.]

The Record further shows that Crowse referred to the same initial point of the same meeting with James, that Crowe thought that they deserved more money, the only aspect of what was deemed to be "concerted" activity; thereafter, each man went off on his own [R. Tr. p. 100, line 5, to p. 102, line 14.] Zuniga made no mention of said meeting with James [R. Tr. pp. 118-133.] Wiley referred to the same initial meeting with the expressed belief that it was either Fournier or Crowe that initiated the meeting by Fournier deciding that he should have $900.00 a month, that Crowe decided he should have $850.00, that Crowse decided that he did not have a figure at that time, nor did he, nor Zuniga; that they wanted a cost-of-living raise, and uniforms; to which, James is said to have said that he would approach Lam, Petitioner's President, about the matter, and would give them an answer. [R. Tr. p. 138, line 25, to p. 139, line 25.]

Thereafter, according to the Record [R. Tr. p. 16, 74, 106, 143, 121], when told by James that he would talk to each of them, individually, there was no "concerted" stand by the men that they would talk as a group, or through their "spokesman"; instead, each, individually, pursued his own course, as the individual Record shows, completely nullifying the Judge's Finding of Fact, Part II, and his analysis thereof, cit-

ing in support thereof, *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, a case in which all of the employees did the same act for the same reason, that is, they all left the shop—stopped work—because the shop was too cold to work in.

Obviously, there is little or no similarity between that case and the present; there, the employees acted simultaneously, stopping work within a few minutes of each other and leaving the shop here, after an initial statement as to differing desires, each employee acted independent of the other, and deciding his own course. There may have been a general simultaneity of action, on the part of said employees, but, there was *no* "concerted" activity as contemplated in said Section 157.

Crowe, although offered a raise [R. Tr. p. 93, line 15], refused to continue in Petitioner's employment. [R. Tr. p. 94, lines 2-12.]

AN EMPLOYER CANNOT BE COMPELLED TO REINSTATE OR PAY PERSONS UNWILLING TO WORK FOR HIM.

Cupples Co. v. N.L.R.B., 106 F.2d 100.

WHERE EMPLOYEES WERE LAWFULLY DISCHARGED, THEY DID NOT REMAIN EMPLOYEES, AND WERE NOT ENTITLED TO REINSTATEMENT TO THEIR FORMER POSITIONS.

N.L.R.B. v. Montgomery Ward & Co., 157 F. 2d 486.

Crowse was terminated because of his lateness on the job. [R. Tr. p. 101, lines 5-15.]

THE BOARD IS NOT ENTITLED TO MAKE ITS AUTHORITY A PRETEXT FOR INTERFERENCE WITH THE RIGHT TO DIS-

CHARGE WHEN THAT RIGHT IS EXERCISED FOR OTHER REASONS THAN INTIMIDATION AND COERCION.

Jefferson Electric Co. v. N.L.R.B., 102 F.2d 949.

Fournier was let go because he had given Petitioner an ultimatum that it was a raise or else. [R. Tr. p. 17, lines 17-23.]

NO ORDER OF THE BOARD SHALL REQUIRE THE REINSTATEMENT OF ANY INDIVIDUAL AS AN EMPLOYEE WHO HAS BEEN SUSPENDED OR DISCHARGED, OR THE PAYMENT TO HIM OF ANY BACK PAY, IF SUCH INDIVIDUAL WAS SUSPENDED OR DISCHARGED FOR CAUSE.

Section 160(c), Title 29, U.S.C.

AN EMPLOYER MAY DISCHARGE AN EMPLOYEE FOR A GOOD REASON, A POOR REASON, OR NO REASON AT ALL, SO LONG AS THE PROVISIONS OF THIS ACT (Sec. 151 et seq.) ARE NOT VIOLATED.

N.L.R.B. v. Edward G. Budd Mfg. Co., 138 F.2d 86.

it being that—

UNDER THIS ACT (Sec. 151 *et seq.*), THE RIGHT TO HIRE AND DISCHARGE REMAINS INVIOLATE, WHEN EXERCISED FOR ORDINARY ENDS, AND THE EMPLOYER MAY STILL DISCHARGE FOR GOOD CAUSE OR NOT CAUSE AT ALL.

Jefferson Electric Co. v. N.L.R.B., 102 F.2d 949.

THE QUESTION AS TO PROPER DISCIPLINE OF EMPLOYEES WAS A MATTER FOR THE DECISION OF THE MANAGEMENT IN ITS DISCRETION.

N.L.R.B. v. Montgomery Ward & Co., 157 F.2d 486.

In fine,

THE RIGHTS OF AN EMPLOYEE GUARANTEED BY THIS SECTION (157) ARE NOT UNLIMITED BUT MUST BE EXERCISED, IN CONFORMANCE WITH HIS DUTY TO HIS EMPLOYER.

N.L.R.B. v. Rockaway News Supply Co., 197 F.2d 111.

Furthermore,

THE BOARD DOES NOT HAVE AUTHORITY TO IMPOSE A PENALTY OR TO INTERFERE WITH THE NORMAL EXERCISE OF THE RIGHT OF AN EMPLOYER TO CONDUCT ITS BUSINESS.

N.L.R.B. v. Cape County Milling Co., 140 F.2d 543.

From the foregoing, assuming, *arguendo,* but not conceding said assumption, that Petitioner was engaged in interstate commerce so as to bring its activities within the purview of Section 151 *et seq.,* still, there is no evidence to support the Part II of the Judge's Findings of Fact. Instead, said involved employees, when contacting Petitioner through its Agent, were not engaged in a concerted action so as to come within the purview of Section 157, Title 29, United States Code.

Conclusion.

For these reasons, a Writ of Certiorari should issue to review the Order of the United States Court of Appeals, for the Ninth Circuit to enforce an Order of the National Labor Relations Board.

Respectfully submitted,

JOSEPH E. MORRIS,
Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Aircraft & Helicopter Leasing & Sales, Inc., Respondent. No. 74-1796.

ORDER

[March 17, 1975].

On Petition to Enforce Order of the National Labor Relations Board.

Before: BARNES, TRASK and GOODWIN, Circuit Judges.

This proceeding is brought by the National Labor Relations Board to enforce an order of the Board issued on February 28, 1974, against respondent requiring it to reinstate three employees, who the Board found were illegally discharged in violation of Section 8(a)(1) of the National Labor Relations Act for engaging in protected concerted activity. The Board's decision is reported at 209 NLRB No. 43.

Respondent advances two reasons why the order of the Board ought not to be enforced: (1) "there is no substantial evidence in the record to support the Board's findings," and (2) "the Administrative Law Judge in a hearing of this matter committed prejudicial error in [a] failing to exclude the witnesses from the hearing, in [b] admitting immaterial evidence, and in [c] limiting examination of witnesses."

As to the first issue, it is the contention of respondent that two of the employees in question quit and the other

one was fired for poor job performance, and that none of them was fired for engaging in concerted activity. There is evidence in the record which is certainly susceptible to this interpretation, but this is not the only interpretation which this evidence will support. Most of the evidence would support either the petitioner's or respondent's version of the facts depending on whether one interprets the employees' threats to "walk out" as a threat to strike (a concerted and protected activity), or a threat to quit *en masse.* (If the employees quit they could not have been improperly terminated.) (*See e.g.*, R.T. 120 ln 20-25; R.T. 196, 1n 2-4). Some of the evidence more strongly supports an inference that the employees were fired for their concerted efforts (*See* R.T. 17 1n 17, to 18 1n 8; R.T. 108 1n 14 to 109 1n 4; R.T. 115 1n 23 to 25), other evidence supports the inference that they quit (*See* R.T. 43 1n 17-22; R.T. 51 1n 11-24; R.T. 52 1n 3-5; R.T. 78 1n 10-11; R.T. 79 1n 1-3; R.T. 193 1n 2-194 1n 19; R.T. 145 1n 14-19; R.T. 146 1n 7-10). Much of the testimony is ambiguous. It is possible and perhaps likely that even the parties themselves were unsure of what they intended to do. (*See* R.T. 73 1n 10-15).

We have carefully read the entire record and while one or more of this panel might not have decided the case the way the hearing examiner did, we conclude that his determination, and that of the Board (that the employees were terminated in violation of § 8(a)(1)) is supported by substantial evidence.

Concerning respondent's remaining contentions, we conclude that any acts complained of do not amount to an abuse of discretion, or reversible error.

First, the complained of admission into evidence of the pay check stubs with the word "terminated" written

on them was no error. In light of the other testimony of this case, and in its own right, this was material and relevant evidence. Since this case was heard before a hearing examiner, and not a jury, there is little risk of prejudice—especially (a) since respondent was afforded, and fully utilized, an opportunity to explain that "terminated" could mean either voluntary or involuntary cessation of employment; and (b) permitted to explain how the word "terminated" came to be placed on the checks, and under whose authority it was done. (*See, e.g.*, R.T. 202 *et seq.*)

Second, as to the limiting of respondent's cross-examination of witness Fournier concerning his discussions with a representative of the N.L.B.R. (R.T. 36-40), we cannot say that the exclusion of this testimony (of little apparent relevance), was an abuse of discretion. Whether or not the officer of the day in charge when the employees contacted the N.L.R.B. gave the employees "good or bad advice" regarding engaging in concerted activity—which was attorney Morris's avowed purpose in seeking to continue that line of questioning R.T. 38 1n 16-25)—appears to us, as it did to Judge Boyce (R.T. 39-40), to be of but tangential relevance to what the employees actually did. Because the excluded testimony could have had some bearing on motive, it probably should have been admitted, but viewing the record as a whole, we cannot say that its exclusion was prejudicial to respondent's case.

Third, relative to respondent's objection to the non-sequestration of discriminatees Fournier and Crowse, we note that this is also a matter committed to the sound discretion of the trier of fact. *See N.L.R.B. v. Quality & Service Laundry,* 131 F.2d 182, 183 (4th

Cir. 1942), *cert. denied,* 318 U.S. 775 (1942); *N.L.R.B. v. Great Atlantic & Pacific Tea Co.*, 408 F.2d 374, 375 (5th Cir. 1969). The Board has repeatedly held that alleged discriminatees are "parties" to a proceeding and, as such, cannot be excluded from the hearing. *Sopps, Inc.*, 189 NLRB 822 (1971); *T.I.L. Sportswear Corp.*, 131 NLRB 176, 177 n.1 (1961) enf'd., 302 F.2d 186 (D.C. Cir. 1962); *Walsh-Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 295 (1960), enf'd., 291 F.2d 751 (8th Cir. 1961); *Scott Gross Co.*, 197 NLRB 420 n.1, enf'd., 477 F.2d 64 (6th Cir. 1973). The failure to separate witnesses who give similar testimony before a hearing examiner of the NLRB may be improvident, but it is not an abuse of discretion which requires the denial of the Board's petition for enforcement. *See N.L.R.B. v. Burke Machine Tool Co.*, 133 F.2d 618, 621 (6th Cir. 1943).

Finding substantial evidence to support the decision of the NLRB, and not finding an abuse of discretion or reversible error in the matters alleged by respondent respecting their second issue, we order that the decision of the NLRB in this case be *enforced.*

Supreme Court, U. S.
FILED
AUG 28 1975
MICHAEL RODAK, JR., CLERK

No. 75-29

In the Supreme Court of the United States

OCTOBER TERM, 1975

AIRCRAFT & HELICOPTER LEASING & SALES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Acting General Counsel,
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Deputy General Counsel,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–4) is not officially reported. The decision and order of the National Labor Relations Board are reported at 209 NLRB No. 43.[1]

[1] The decision and order of the Board, and the decision of the Administrative Law Judge, which was adopted by the Board, were not printed in the appendix to the petition and are appended to this brief, *infra*, pp. 1a–11a.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1975. A petition for rehearing was denied on April 9, 1975. The petition for a writ of certiorari was filed on July 7, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner discharged three employees for engaging in concerted activity protected by Section 7 of the National Labor Relations Act.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), provide:

> Section 7. Employees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.
>
> Section 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *.
>
> Section 10(e). * * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

STATEMENT

A. The Board's Findings of Fact

Petitioner is engaged in the business of rebuilding, maintaining, selling, and leasing helicopters in Sun Valley, California (R. 5, 10, 13).[2] The Board found that the Company's operations affected commerce within the meaning of the Act.[3]

On Monday, February 5, 1973, five of the company's employees—Stephen Crowe, Dan Crowse, J. C. Fournier, George Zuniga, and Royal Wiley—met together and discussed their dissatisfaction with their wages and other working conditions (R. 13; Tr. 69–71, 87–88, 119–120, 137–138). Later that day, the five employees confronted Service Manager Jessie James

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[2] "R." refers to the formal documents bound as "Volume I, Pleadings," and "Tr." refers to the stenographic transcript of the testimony at the Board hearing.

[3] The Board's General Counsel alleged in the complaint that the company "has been at all times material herein, engaged in the business of rebuilding, maintaining, selling and leasing helicopters," and that it "received gross annual revenues from its business operations in excess of $129,000 of which in excess of $50,000 was derived from shipment of goods from its Sun Valley plant directly to points outside the State of California" (R. 5–6). The complaint further alleged that the company "is now, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act" (R. 6). The company's answer to the complaint failed to deny these specific jurisdictional allegations (R. 10), and the Administrative Law Judge found that it "is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act" (R. 13). The company's exceptions before the Board to the Administrative Law Judge's decision did not challenge this finding (R. 23–29), nor was it questioned before the court of appeals.

with demands for increased base pay, individual pay raises, cost-of-living increases, pension benefits, and company-provided uniforms (R. 13; Tr. 10–11, 41–42, 67–68, 99–102, 138–139, 174–176).[4] Crowe, the employees' principal spokesman (R. 13; Tr. 67), told James that the employees would "walk out" if their demands were not met (R. 13; Tr. 83–84, 115, 153, 175–176, 189). That afternoon, James informed company president George Lam of the employees' demands and their threat to walk out (R. 13; Tr. 176–177, 212–213). James told Lam that he thought Crowe, Crowse, and Fournier would walk out, but that Wiley and Zuniga would not (R. 13; Tr. 227–228).

The five employees met together that evening and agreed among themselves that they would stick together to support one another if the employer discharged any of them or offered a few of them raises in order to divide the group (R. 13; Tr. 29–30, 71–73, 103–104, 120). They set Friday, February 9, as the deadline for the granting of their demands, and decided to "walk out" either if their demands were not met or if anyone were fired (R. 13; Tr. 30–31, 104, 147).

On Wednesday, February 7, employee Fournier told James that Friday was the deadline, and later that day James told Lam that he "had a feeling that the guys were still going to walk out" (R. 13; Tr. 33, 140–141, 178, 181, 189). Lam then authorized a merit raise for employee Crowe, but not for any other employee (R. 13; Tr. 178–179, 206, 214–215).

[4] The employees are not represented by a union (R. 13).

On Friday, February 9, James again told Lam that he thought Crowse, Crowe, and Fournier would walk out, but that Wiley and Zuniga would not. Lam thereupon instructed James to have the bookkeeper prepare final paychecks for Crowse, Crowe, and Fournier (R. 13–14; Tr. 184, 190–192, 207, 216–217). At about 4:30 p.m. that day, Crowe asked James if any decision had been made about the employees' demands (R. 14; Tr. 15–16, 105–106, 181–182). James replied that either he or Lam would meet singly with the employees in the office but would not meet with them collectively (R. 14; Tr. 16, 42, 181–182). The employees reluctantly agreed to this procedure (R. 14; Tr. 42, 46–49, 76–77, 142–143).

Crowse, the first employee to meet with James, said that if he had not jeopardized his job he would like to stay with the company. James replied that the company was not satisfied with his past work performance and could not keep him on the payroll (R. 14; Tr. 116–117, 164–165, 183, 188, 194–195). James then handed Crowse his paycheck, which had the word "terminated" typed on the stub. When Crowse asked if his discharge was "just because of the actions we took toward the Company," James replied "Yes" (R. 14; Tr. 108).

Crowse thereupon informed the other employees what had happened to him (R. 39, n. 2; Tr. 17, 43, 50, 77, 109, 121). Fournier immediately entered James's office and asked if the employees were going to receive raises (R. 39, n. 2, 14; Tr. 17, 186, 195). James said they were not, and Fournier replied: "That's it. I am

through. I'll get my toolbox and leave" (R. 14; Tr. 186, 195). James then gave Fournier his paycheck, which also had "terminated" typed on the stub, and stated that "under the circumstances, this is all we can do * * *. You delivered us an ultimatum, and we decided to let a couple of you go" (Tr. 17–18, 35, 55–56).

Shortly thereafter, Crowe, who was aware that "two men had already been fired," met with James and was offered the raise previously authorized by Lam (R. 14; Tr. 51–52, 78, 91–93, 145–146, 162, 185, 199). Crowe left James's office and spoke with the other employees. When he returned, he informed James that he could not accept the raise because he had been the instigator of the employees' demands and was obligated to stick with them. As a result, he said, he would have to leave with them. James replied that he was sorry Crowe was insisting on walking out, and he handed Crowe his final paycheck, which also stated "terminated" on the stub (R. 14; Tr. 78–79, 94, 163, 185, 199–200). At no time during this meeting did Crowe tell James that he intended to quit (Tr. 97–98).[5]

[5] Employee Wiley also met with James and informed him that he was going to abandon the group and stay on the job (R. 14; Tr. 186–187, 196–197). Employee Zuniga, too, met with James, who asked if Zuniga was "staying with me or are you going to walk out?" (R. 14; Tr. 187). Zuniga indicated that he had given his word of honor to the men and could not back out; he would have to leave in order to back up his companions (R. 14–15; Tr. 123–124, 126, 187, 196). The complaint issued by the General Counsel did not encompass Zuniga (Tr. 239–240).

The next day, Saturday, February 10, company president Lam, in separate telephone conversations with employees Crowe and Fournier, told them, respectively, "I don't like being delivered an ultimatum, because I am bullheaded," and "You did deliver us an ultimatum, and we had no choice" (R. 15; Tr. 23–24, 59, 61, 80–82, 218–220, 224).

B. *The Decisions Below*

The Board, in agreement with the Administrative Law Judge, concluded that the company violated Section 8(a)(1) of the Act by discharging employees Crowse, Fournier, and Crowe, before they had a chance to carry out their threat to "walk out" in support of their demands, because they had engaged in protected concerted activity (App., *infra,* pp. 1a–3a). The Board ordered the company to cease and desist from the unfair labor practices found, to offer reinstatement to Crowe, Fournier, and Crowse, to make them whole for any loss of pay they may have suffered, and to post the customary notices (App., *infra,* pp. 3a, 9a–11a).

The court of appeals sustained the Board's findings and conclusions and enforced its order (Pet. App. 2, 4).

ARGUMENT

1. The first question petitioner seeks to raise (Pet. 2)—whether the Board properly concluded that the company's operations affected commerce within the meaning of the Act—is not properly presented. In its exceptions before the Board, petitioner did not object to the Administrative Law Judge's conclusion that the

company is engaged in a business affecting commerce within the meaning of the Act, which was based on the undenied allegations of the complaint that the company received gross annual revenues in excess of $50,000 from the shipment of goods from its California plant to points outside that state (see p. 3, n. 3, *supra*). Therefore, Section 10(e) of the Act precludes judicial review of the issue. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255–256; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350. Consideration of the issue here is further foreclosed because petitioner did not challenge the Board's jurisdiction in the court of appeals. *Duignan* v. *United States*, 274 U.S. 195, 200; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. In any event, under settled principles, it is clear that the Board has jurisdiction over the company's operations. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–32; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 326. *National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224.

2. The second question presented (Pet. 2)—whether the Board properly found that the three employees were discharged by petitioner for engaging in concerted activity protected by the Act rather than for "quitting"—raises only an evidentiary question which does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. In any event, the evidence summarized above amply supported the Board's findings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. MILLER,
Acting General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

HOWARD E. PERLSTEIN,
Attorney,
National Labor Relations Board.

AUGUST 1975.

APPENDIX

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

AIRCRAFT AND HELICOPTER LEASING AND SALES, INC.

and Case 31--CA--3587

STEPHEN H. CROWE, an Individual

DECISION AND ORDER

On June 19, 1973, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and also filed a motion requesting that the decision of the California Unemployment Insurance Appeals Board be received for consideration.[1/]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2/]

1/ In the absence of opposition to this motion, we are accepting the document presented. However, our decision in this case has not been influenced by the information contained therein.

2/ Member Kennedy would not find that Respondent discharged Fournier. According to the Administrative Law Judge's finding when Fournier asked Service Manager James if the employees were going to receive a raise, James answered in the negative. Thereupon Fournier said: "That's it. I am through. I'll get my tool box and leave."

If words mean anything, this was a declaration that the speaker was quitting. This meaning was emphasized by his statement that he was going to

(continued)

In adopting the findings and conclusions of the Administrative Law Judge, we find the contention of Respondent that Crowe and Fournier quit lacking in merit and not supported by the record.

Respondent, admittedly, was never told by the employees that they were going to "quit" if they did not get their pay increases, but rather that they would "walk out" if their demands were not met. Further, when James informed Lam that he thought that Crowse, Fournier, and Crowe would walk out but not the other two employees, Lam instructed James to have final checks prepared for the three employees who James anticipated would walk out.

Although Respondent contends that it believed that the employees meant that they would quit if their demands were not met, such a belief had no basis either in what the employees had told James or in any actions of the employees. Further, such a belief on the part of the Respondent would not alter the protected nature of the employees' actions, when the employees in fact did not intend to quit, but only to put pressure on Respondent to meet their demands by walking out.

The preparation of the employees' final checks with the word "terminated" on them, plus the conversations between Lam and both Crowe and Fournier, following

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2/ receive his tool box. Although Respondent may have intended to discharge Fournier, it never had the opportunity to act upon that intent. In the vernacular, Fournier beat the gun by quitting. Although not controlling, it is significant that the California Unemployment Insurance Appeals Board ruled that Fournier had quit his employment and denied him unemployment insurance benefits. Except as to Fournier, Member Kennedy would adopt the Administrative Law Judge's Decision.

Members Fanning and Penello, unlike Member Kennedy, do not believe that the language used by Fournier to James on February 9 merits a finding that Fournier voluntarily quit. While under different circumstances, such language may be evidence of a voluntary termination of an employee, such is not the case herein. Before entering James' office, Fournier was aware that Crowse, who had weakened in his resolve to stay with the other employees in their endeavor, had received his check when he went in to talk to James. Thus the language used by Fournier is such as might be used by anyone who expected similar treatment for engaging in concerted activity and affords no basis for our treating Fournier differently from those employees with whom he had been concertedly acting.

their termination, in which Lam stated that he did not like being given an ultimatum and that the employees had given him no choice, leads us to the belief that Respondent discharged the three employees before they had a chance to carry out their threat to walk out.

Based on the foregoing and the other findings of the Administrative Law Judge, we find that the discharges of Crowse, Crowe, and Fournier were in violation of Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Aircraft and Helicopter Leasing and Sales, Inc., Sun Valley, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C.

John H. Fanning, Member

Ralph E. Kennedy, Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

AIRCRAFT AND HELICOPTER LEASING
AND SALES, INC.

and Case No. 31-CA-3587

STEPHEN H. CROWE, An Individual

Glenn A. Summers, Esq., of Los
Angeles, Calif., for the General
Counsel.
Joseph E. Morris, Esq., of Eu ino,
Calif., for the Respondent.

DECISION

Statement of the Case

RICHARD J. BOYCE, Administrative Law Judge: This case was tried before me in Los Angeles, California, on June 4 and 5, 1973. The charge was filed February 14, 1973, by Stephen H Crowe, an individual, and was amended March 28. 1/ The complaint issued April 13, alleging that Aircraft and Helicopter Leasing and Sales, Inc. (herein called Respondent) had violated Section 8(a)(1) of the National Labor Relations Act, as amended.

Issues

The issues are whether Respondent discharged its employees, Stephen H. Crowe, Dan Crowse, and J. C. Fournier, on or about February 9, 1973, because of their engagement in protected, concerted activities, thereby violating Section 8(a)(1) of the Act.

The parties were given full opportunity at the trial to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Both Respondent and the General Counsel waived briefs.

1/ All dates are 1973.

JD-(SF)-128-73

Upon the entire record in the case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is a California corporation engaged at Sun Valley, California, in the business of rebuilding, maintaining, selling, and leasing helicopters. During the year preceding issuance of the complaint, Respondent realized revenues exceeding $50,000 from the shipment of goods from its Sun Valley location directly to customers outside California.

Respondent is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Alleged Unfair Labor Practices

While there are the inevitable minor discrepancies in testimony, the fundamental facts are not in dispute.

On Monday, February 5, pursuant to an earlier agreement among themselves, five of Respondent's mechanics - the three in question, plus Royal Wiley and George Zuniga - confronted Jessie James, Respondent's service manager, with demands for increased base pay, cost-of-living pay increases, and company-provided uniforms. Alleged Dischargee Crowe was the employees' principal spokesman. Crowe told James that the employees would walk out if their demands were not met. James answered that he would discuss the demands with George Lam, Respondent's president, and report back. The employees were not represented by a union.

That evening, the five employees met at a restaurant near the plant, deciding that Friday evening, February 9, would be the deadline for favorable company action on their demands, and repeated an earlier vow to walk out if their demands were not met or if any of them should suffer recrimination because of them. James meanwhile told President Lam of the demands and the walkout threat, specifying to Lam that he thought the three alleged dischargees would walk out , but that Wiley and Zuniga would not. Lam and James did not then decide on a course of action.

On Wednesday, February 7, Crowe and/or Alleged Dischargee Fournier asked James if anything had been decided. James replied in the negative, prompting Crowe or Fournier to advise him of the Friday deadline. James then met with Lam again. Lam this time authorized James to offer Crowe a raise - $25 per month immediately, another $25 in 30 days - but not the other employees.

On Friday, February 9, at about lunch time, James and Lam met once more. James restated his belief that Crowe, Crowse, and Fournier would walk out - he used the term "walk out," not "quit" - if the demands

were not met, but that Wiley and Zuniga would not. The two decided at that time, because Crowse had been less than a model employee anyway, to "let Dan go." 2/ Lam also instructed James to have the bookkeeper prepare final checks for all three alleged dischargees, but not Wiley and Zuniga. This promptly was done, although the regular payday was a week away. Finally, Lam and James decided that they would talk to the employees singly about their demands, but not as a group.

Toward the close of business, February 9, Crowe asked James if a decision had been reached. James replied that one had, to which Crowe said the employees wished to meet with Lam about it. James answered that neither Lam nor he would meet with the employees other than singly. Crowe took this information to the other employees, who, after some soul searching, decided to meet with James on his terms - i.e., singly. Crowse and Wiley indicated to the others at this time that they were weakening in their resolve to stay with the group.

Crowse was the first to meet with James. Upon entering James' office, he said that he had changed his mind and would like to stay if he had not already jeopardized his job by joining in the protest. James, referring to Crowse's shortcomings as an employee, said that Respondent could not keep him on the payroll. He then gave Crowse his final paycheck, the stub of which had the word "terminated" on it. Crowse asked James, before leaving, if the employees' recent activities to improve conditions were a factor in this decision. James replied that they were.

Fournier succeeded Crowse in James' office. He asked, upon entering, if the employees were going to receive raises. James said no, prompting Fournier to state: "That's it. I am through. I'll get my tool box and leave." James then gave him his final check, which also had "terminated" written on the stub.

Crowe also met with James. James offered him a raise in accordance with the earlier authorization from Lam. Crowe, after excusing himself briefly to consult with the other employees, declined the offer, saying that he could not stay and accept a raise when the others would get none - "I have got to leave with them." As Crowe turned to leave, James said, "Steve, you might as well take your check with you," handing him his final check, with "terminated" on the stub. Crowe asked, in the moment before the import of this gesture had soaked in, 'What's this for?"

Wiley and Zuniga met singly with James as well. Wiley told James that, because of family considerations, he was going to abandon the group and stay on the job. His employment since has continued unabated. James asked Zuniga if he was "staying with me or are you going to walk out?" adding, 'Well, George, I didn't expect you to go out with these men," and telling him that he had until the following Monday to make up his mind.

2/ Respondent had been seeking a replacement for Crowse for several days, but as yet had found none.

Zuniga replied, "I must leave with the other fellows . . . . I leave the work just to back up my companions." Zuniga did not appear for work thereafter, eventually receiving a final check with "terminated" on the stub.

The next day, February 10, Crowe and Fournier separately telephoned President Lam to wish him well on a coming trip to Europe. Both conversations turned to happenings of the previous day, Crowe and Fournier stating in effect that they had entered into a pact with the other employees and were honor-bound to stay by their word. To Crowe, Lam said, "I don't like being delivered an ultimatum, because I am bull-headed"; and to Fournier, "You did deliver us an ultimatum and we had no choice." Lam volunteered to both that he would be willing to talk to each about returning to work. 3/ Such conversations never ensued.

James testified that none of the employees, at any time before the employees in question received their final checks, used the term "quit" - as opposed to "walk out" - when discussing the action they would take should their demands not be met. James further testified, however, as did Lam, that he considered the terms to be interchangeable, both meaning a severance of employment.

Analysis

The General Counsel contends that the employees' concerted demands for higher pay and work clothes, backed by a walkout threat, were protected activities; that Crowe, Crowse, and Fournier resultantly were fired on February 9; and that Respondent thereby violated Section 8(a)(1). Respondent does not seriously dispute the protectedness of the employees' activities, instead arguing that the employees in question voluntarily quit their jobs upon Respondent's refusal to accede to their demands.

I find that the employees' pay and clothing demands, coupled with the walkout threat, indeed were protected activities. E.g., N.L.R.B v. Washington Aluminum Co., 370 U.S. 9 (1962). I further find, in agreement with the General Counsel, that Crowe, Crowse, and Fournier resultantly were discharged.

That Crowse quit is not fairly arguable. Lam admitted that the decision was made earlier in the day to let him go; and Crowse was told by James that he could not be retained even though he just before stated his desire to stay on the job and abandon the employees' protected cause. Nor would it be arguable that Crowse was fired for inferior work performance rather than his involvement in that cause, given the context and timing of Respondent's action against him and James' contemporaneous admission to him that the employees' protest activities were a precipitating element.

3/ Neither Crowe nor Fournier could recall any mention by Lam of a possibility of their returning to work. I credit Lam's testimony that mention was made, because of the sureness of his recall of these conversations, his manifest probity, and my failure to see anything particularly self-serving in his so testifying.

The situations of Crowe and Fournier are less clearcut than that of Crowse only in that James, rather than firing them outright, did so when they stated an intent to leave upon James' telling them that Respondent would not meet the employees' concerted demands. Their reference to leaving may have imparted an illusion of sorts that they were quitting their jobs. But neither that nor their actions otherwise conflict with their having had nothing more in mind than conventional strike-type activity; and I find that they - in their unschooled way - contemplated just and only that. Union Camp Corporation, 194 NLRB No. 160; Scientific Glass Apparatus Co., 150 NLRB 29, 36-38; Nemec Combustion Engineers, 100 NLRB 1118. James' expeditious tender of their final checks, with "terminated" on the stubs, unlawfully aborted implementation.

Having found that Respondent discharged Crowe, Crowse, and Fournier for engaging in protected, concerted activities, I further find that it in each instance violated Section 8(a)(1) of the Act.

Conclusions of Law

I. By discharging Crowe, Crowse, and Fournier as found herein, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

II. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

To effectuate the policies of the Act, it is recommended that Respondent be ordered to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing its employees.

Affirmatively, it is recommended that Respondent be ordered to offer Stephen H. Crowe, Dan Crowse, and J. C. Fournier immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges; and to make them whole for any loss of earnings and other benefits suffered because of Respondent's unlawful discharges of them. Their losses of earnings shall be computed as prescribed in Isis Plumbing & Heating Co., 138 NLRB 716, and F. W. Woolworth Company, 90 NLRB 289.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 4/

4/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and Order herein shall, as provided in Section

(continued)

ORDER

Respondent, Aircraft and Helicopter Leasing and Sales, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discharging its employees for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Stephen H. Crowe, Dan Crowse, and J. C. Fournier immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or rights and privileges previously enjoyed and make them whole for any loss of pay suffered as a result of their discharge by Respondent in the manner set forth above under the section entitled "The Remedy."

(b) Preserve and upon request make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post in conspicuous places at the Company's place of business at Sun Valley, California, including all places where notices to employees are customarily posted, copies of the attached notice marked "Appendix." 5/ Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

4/ 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

5/ In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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(d) Notify the Regional Director for Region 31, in writing, within 20 days from the date of receipt of this Order what steps Respondent has taken to comply herewith.

Dated: June 19, 1973.

Richard J. Boyce
Administrative Law Judge

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APPENDIX

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NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The trial held in Los Angeles, California, on June 4 and 5, 1973, in which we participated and had a chance to give evidence, resulted in a decision that we had committed certain unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, and this notice is posted pursuant to that decision.

The National Labor Relations Act, as amended, gives all employees the following rights:

To organize themselves
To form, join, or support unions
To bargain as a group through a representative they choose
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activities

In recognition of these rights, we hereby notify our employees that:

WE WILL immediately offer to reinstate Stephen H. Crowe, Dan Crowse, and J.C. Fournier, to their former or substantially equivalent jobs without prejudice to their seniority and other privileges; and we will pay to them any money lost as a result of their discharges, with interest at 6 percent.

WE WILL NOT discharge or otherwise discriminate against employees who take part in protected concerted activities.

AIRCRAFT AND HELICOPTER LEASING AND SALES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California, 90024. Telephone No. (213) 824-7357.

U. S. GOVERNMENT PRINTING OFFICE : 1975 O - 591-510